No. 18-60606

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF TEXAS; TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; SIERRA CLUB,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ANDREW WHEELER, ACTING ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents

On Petitions for Review of a Final Action
of the United States Environmental Protection Agency

BRIEF FOR TEXAS PETITIONERS

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Respondents

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Texas Commission on Environmental Quality

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STATEMENT REGARDING ORAL ARGUMENT

This case merits oral argument. At issue are two sets of challenges to different portions of a final action of the United States Environmental Protection Agency ("EPA") making area designations under 42 U.S.C. § 7407(d) for eight Texas counties for the 2015 national ambient air quality standards ("NAAQS") for ground-level ozone. In keeping with its statutory prerogative, the State of Texas designated all of these counties as attainment areas for the 2015 ozone NAAQS. EPA overrode one of those designations, designating Bexar County a nonattainment area.

The State of Texas; Greg Abbott, Governor of Texas; and the Texas Commission on Environmental Quality ("the Texas Petitioners") petitioned this Court for review. They argue that EPA improperly modified Texas's attainment designation for Bexar County. The Sierra Club filed a second petition for review. It argues that EPA improperly designated the seven counties surrounding Bexar County as attainment/unclassifiable areas. Both the Texas Petitioners and the Sierra Club (joined by the Environmental Defense Fund) support, as cross-respondents-intervenors, the portion of EPA's action that the other side challenges.

This matter carries significant consequences for the State and its economy. In light of those consequences and the case's procedural posture, the Texas Petitioners believe that oral argument is warranted and would assist the Court's decisional process.

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In this brief, "C.I." refers to the certified index of record contents that EPA filed on October 9, 2018. *See* Fed. R. App. P. 17(b)(1)(B). Documents are identified by the final four digits (minus leading zeros) of "Document ID" numbers on the certified index. In accordance with Fifth Circuit Rule 30.2(a), the Texas Petitioners will file an appendix containing the portions of the record cited in their and the other parties' briefs. The appendix will be tabbed to correspond to the final four digits (again minus leading zeros) of document numbers on the certified index.

Statement of Jurisdiction

Additional Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards—San Antonio, Texas Area, 83 Fed. Reg. 35,136 ("the Challenged Action"), was published in the Federal Register on July 25, 2018. The petitions for review were timely filed on August 28, 2018, and September 24, 2018, invoking this Court's jurisdiction under 42 U.S.C. § 7607(b)(1).

Issue Presented by Texas Petitioners

The Clean Air Act empowers States to designate areas within their borders as "nonattainment," "attainment," or "unclassifiable" with respect to any NAAQS that EPA sets. 42 U.S.C. § 7407(d)(1)(A). EPA may modify a State's designation only when "necessary." *Id.* § 7407(d)(1)(B)(ii). In the Challenged Action, EPA modified Texas's designation of Bexar County from "attainment" to "nonattainment" with respect to the 2015 ozone NAAQS after refusing even to consider the photochemical modeling data on which Texas relied.

The issue presented by the Texas Petitioners is whether EPA's modification of Texas's Bexar County attainment designation was necessary or was instead arbitrary, capricious, an abuse of discretion, in excess of statutory authority, or otherwise not in accordance with law.

Introduction

Under the Clean Air Act's system of cooperative federalism, EPA may override discretionary actions by States only when the Act commands that result. That is true not only of States' plans to implement NAAQS, but also of States' "nonattainment," "attainment," and "unclassifiable" designations of areas within their borders.

Here, Texas designated Bexar County an attainment area for the 2015 ozone NAAQS, citing photochemical modeling data reflecting that the area would, in the relevant timeframe, meet the NAAQS without imposition of the burdens that accompany a nonattainment designation. EPA, however, overrode that designation

based on its conclusion that the Clean Air Act prohibited it from even considering the modeling data that supported Texas's designation.

In fact, the statute gives both States and EPA leeway to consider modeling data in this scenario. For that reason, the Court should set aside the portion of the Challenged Action that modified Texas's Bexar County attainment designation.

If left unchecked, EPA's action threatens substantial economic losses to local Texas businesses and governments. One report estimated that a nonattainment designation of the type EPA imposed on Bexar County would cost the region more than a billion dollars. And again, the modeling data on which Texas relied reflects that Bexar County will timely attain the NAAQS without a nonattainment designation—and therefore without incurring any of that cost. The Court should require EPA to at least consider the data Texas presented before inflicting harm on the State of that magnitude.

STATEMENT OF THE CASE

As this Court recently observed, "[t]he Clean Air Act is an experiment in cooperative federalism. It establishes a comprehensive program for controlling and improving the nation's air quality through state and federal regulation." *Texas v. EPA*, 829 F.3d 405, 411 (5th Cir. 2016) (citations and quotation marks omitted). In brief, EPA sets air-quality requirements through NAAQS, and the States determine how best to meet those requirements.

An early part of that cooperative process entails designating geographic areas within a State for purposes of one or more NAAQS. Consistent with the Act's broader structure, the designation procedure calls for initial action by the States, and

it allows EPA to modify that action only when necessary. That statutory design accounts for the consequences of area designations, which can be substantial and which are primarily felt at the state and local levels. This case involves the interplay between state and federal interests in the area-designation process.

I. Statutory Framework

A. NAAQS and their implementation

The Clean Air Act directs EPA to establish NAAQS at the level needed to protect public health and welfare. 42 U.S.C. § 7409(b)(1)-(2); *see id.* § 7408. After EPA sets a NAAQS, States may submit implementation plans specifying how the NAAQS will be met within their borders. *Id.* §§ 7407(a), 7410(a). EPA may promulgate a federal implementation plan only if it finds that a State either failed to submit its own compliant plan or EPA disapproves part or all of the State's plan. *Id.* § 7410(c). And even in one of those scenarios, a State may avoid a federal implementation plan if it corrects the deficiency EPA identified and EPA approves the State's plan before promulgating a federal plan. *Id.*

B. Area designations

The Clean Air Act establishes a two-step process for designating geographic areas of a State for purposes of a NAAQS. *Id.* § 7407(d)(1). As with plans to implement NAAQS, States have the initial opportunity to make area designations. EPA steps in only after a State has acted or declined to act.

1. The States' role under 42 U.S.C. § 7407(d)(1)(A)

Section 7407(d)(1)(A) provides:

> By such date as the [EPA] Administrator may reasonably require, but not later than 1 year after promulgation of a new or revised [NAAQS] . . ., the Governor of each State shall (and at any other time the Governor of a State deems appropriate the Governor may) submit to the Administrator a list of all areas (or portions thereof) in the State, designating as—
>
> (i) nonattainment, any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the [NAAQS] . . .,
>
> (ii) attainment, any area (other than an area identified in clause (i)) that meets the [NAAQS] . . ., or
>
> (iii) unclassifiable, any area that cannot be classified on the basis of available information as meeting or not meeting the [NAAQS] . . . .

See 1 U.S.C. § 1 (the Dictionary Act, which provides that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise— . . . words used in the present tense include the future as well as the present"); Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications Approach, 83 Fed. Reg. 10,376, 10,380 (Table 2) (Mar. 9, 2018) (establishing the air-quality thresholds that define the five nonattainment classifications (marginal, moderate, serious, severe, and extreme) for the 2015 ozone NAAQS in accordance with 42 U.S.C. § 7511).

2. EPA's role under 42 U.S.C. § 7407(d)(1)(B)

Section 7407(d)(1)(B)(i) requires EPA to "promulgate the designations of all areas (or portions thereof) submitted [by a State] under subparagraph (A)." *See* 42 U.S.C. § 7407(d)(2)(A) (reflecting that promulgation of an area designation under section 7407(d)(1) is accomplished through publication of a notice in the Federal Register). Section 7407(d)(1)(B)(ii) qualifies that general ministerial obligation,

granting EPA a modification power that differs based on whether a State did or did not make initial area designations.

When a State has already made designations, the statute allows EPA only to "make such modifications as [it] deems *necessary* to the designations of the areas (or portions thereof) submitted under subparagraph (A) (including to the boundaries of such areas or portions thereof)." *Id.* § 7407(d)(1)(B)(ii) (emphasis added); *see also id.* (ensuring that a State receives notice of EPA's intent to modify its designations and an opportunity to respond). But when a State "fails to submit the list [of designations] in whole or in part, as required under subparagraph (A), [EPA] shall promulgate the designation that [it] deems *appropriate* for any area (or portion thereof) not designated by the State." *Id.* (emphasis added); *see also id.* §§ 7407(d)(3)(A)-(C), 7407(d)(4)(A)(i)-(ii) (applying the same framework of cooperative federalism).

II. The 2015 Ozone NAAQS

In 2014, EPA published a proposal to revise the NAAQS for ozone, a gas that threatens public health and welfare when present in the lower atmosphere. National Ambient Air Quality Standards for Ozone, 79 Fed. Reg. 75,234 (proposed Dec. 17, 2014). It finalized that action in 2015, replacing the preexisting NAAQS with more stringent NAAQS of 0.070 parts per million ("ppm") (or 70 parts per billion ("ppb")). National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015). Petitions for review of that final action are pending in the D.C. Circuit under lead case No. 15-1385.

III. Designation of Bexar County and the Seven Surrounding Counties for Purposes of the 2015 Ozone NAAQS

A. Texas's designations

Based on data collected by air-quality monitors reflecting that ground-level ozone in Bexar County exceeded 70 ppb in 2013, 2014, and 2015, Texas initially designated Bexar County a nonattainment area. Letter from Texas Governor Greg Abbott to Janet G. McCabe, Assistant EPA Administrator, and Ron Curry, Regional EPA Administrator (Sept. 30, 2016), https://www.epa.gov/sites/production/files/2016-11/documents/tx-rec.pdf ("Initial Designation Letter") (available at https://www.epa.gov/ozone-designations/ozone-designations-2015-standards-texas-state-recommendations-and-epa-response).* Texas designated the counties surrounding Bexar County (Atascosa, Bandera, Comal, Guadalupe, Kendall, Medina, and Wilson Counties) as "Unclassifiable/Attainment." *See id.*, Resolution Attachment A.

But a year later, and before EPA promulgated any area designations for the 2015 ozone NAAQS, Texas sent EPA a letter asking it "not to make 'nonattainment' designations [for Bexar County and counties in other parts of the State] now and instead to allow the state more time to show that additional data and considerations . . . warrant an 'attainment' or 'unclassifiable/attainment' designation." C.I. No. 214 at 2; *see Masias v. EPA*, 906 F.3d 1069, 1072 (D.C. Cir. 2018) (explaining that EPA has

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* This and the other cited documents that do not appear on EPA's certified index of record contents are available at the cited EPA webpages.

historically used the label "'unclassifiable/attainment' . . . for areas that are 'attainment' or 'likely attainment'" but that "there is no practical difference between 'attainment' and 'unclassifiable/attainment'"); 83 Fed. Reg. at 35,137 (explaining that, "[i]n the designations for the 2015 ozone NAAQS, the EPA has reversed the order of the label to be attainment/unclassifiable to better convey the definition of the designation category"); *id.* at 35,138 (stating the chronology of the 2015 ozone NAAQS area designations). Texas's letter referenced a study indicating that the costs to the San Antonio region of a nonattainment designation, which would come in the form of permitting costs, project delays, and lost gross regional product, would exceed a billion dollars. C.I. No. 214 at 2 (citing C.I. No. 297, App. B at iv-vi).

In response to EPA's request for more information regarding Bexar County, Letter from Anne L. Idsal, Regional EPA Administrator, to Texas Governor Greg Abbott (Jan. 19, 2018), https://www.epa.gov/sites/production/files/2018-01/documents/epa_ltr_gov_abbott_1_19_2018.pdf (available at https://www.epa.gov/ozone-designations/ozone-designations-2015-standards-texas-state-recommendations-and-epa-response), Texas retracted its initial nonattainment designation. Explaining that "Bexar County is projected to meet the 2015 NAAQS by 2020 — sooner than would be required by a nonattainment designation — without the need for additional federal intervention," it "urge[d] [EPA] to designate Bexar County as in attainment." C.I. No. 297 at 1. The State relied on an analysis in a governmental group's report based on photochemical modeling. *Id.* at 4 (citing pages 1-4 and 4-8 of the report attached as Appendix A).

Texas's letter also highlighted "Bexar County's impressive history of reducing ozone pollution without a nonattainment designation." *Id.* at 5; *see* Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards; Early Action Compact Areas With Deferred Effective Dates, 69 Fed. Reg. 23,858, 23,864-65, 23,866-67 (Table 3) (Apr. 30, 2004) (reflecting that Bexar County was one of several communities that, more than 15 years ago, "agreed to reduce ground-level ozone pollution earlier than the [Clean Air Act] would require"). The letter noted the "dramatic reduction in [Bexar County] ozone levels since 2004," adding that "[t]his environmental accomplishment is all the more impressive because it coincided with Bexar County gaining more than 400,000 new residents." C.I. No. 297 at 5. The letter cited (at 5 n.4) a Texas Commission on Environmental Quality website reflecting that, between 2004 and 2017, ozone design values as recorded at three San Antonio air-quality monitors fell from 79 ppb to 65 ppb, from 89 ppb to 73 ppb, and from 91 ppb to 74 ppb. *See* 83 Fed. Reg. at 35,139 & n.5 (explaining that an area's "design value" is determined by the most recent 3 years of air-quality data and that "[t]he air quality design value for the 8-hour ozone NAAQS is the 3-year average of the annual 4th highest daily maximum 8-hour average ozone concentration"); Final 8-Hour Ozone National Ambient Air Quality Standards Designations for the Early Action Compact Areas, 73 Fed. Reg. 17,897, 17,899 & Table 1 (Apr. 2, 2008) (reflecting Bexar County's repeated satisfaction of EPA's milestones for deferral of a nonattainment designation).

Based on the three-year span between a marginal nonattainment designation (*see* 42 U.S.C. § 7511; 83 Fed. Reg. at 10,380 (Table 2)) and the need to show attainment,

Texas's letter explained that "a nonattainment designation would be geared toward more slowly achieving a result that Bexar County will already achieve on its own without federal intervention." C.I. No. 297 at 5 (citing Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications and State Implementation Plan Requirements, 81 Fed. Reg. 81,276, 81,286 (proposed Nov. 17, 2016)).

B. EPA's proposed modification of Texas's Bexar County designation, Texas's response, and public comments

After receiving Texas's Bexar County attainment designation, EPA first sent a letter announcing its intention to modify that designation by "designat[ing] all or portions of Bexar County as, at best, Unclassifiable." C.I. No. 313 at 2. The letter referenced an initial EPA technical support document for the San Antonio area (C.I. No. 314) and invited Texas to submit additional information. *Id.*

Texas responded with another letter explaining why EPA "should designate Bexar County as 'attainment' or, at worst, 'unclassifiable.'" C.I. No. 364 at 1. This letter provided further support for Texas's attainment designation. *Id.* at 1-8; *see also* C.I. No. 314 at 21 (initial EPA technical support document reflecting that modeling based on one set of data showed violation of the NAAQS in Bexar County in 2020 but that modeling based on more recent data "project[ed] that the three Bexar County monitors will meet the 2015 NAAQS by 2020, with design values all lower than 71 ppb, and will all be well below the 2015 NAAQS by 2023").

In addition to corresponding with Texas, EPA took public comment on whether to designate Bexar County and the surrounding counties as nonattainment, attainment, or unclassifiable. *See* 83 Fed. Reg. at 35,138. The agency received approximately three dozen comments on this topic, most of which opposed nonattainment designations. *E.g.*, C.I. No. 334 (Guadalupe County Commissioners Court); C.I. No. 337 (San Antonio Hispanic Chamber of Commerce); C.I. No. 342 (Alamo Area Council of Governments); C.I. No. 349 (Texas Pipeline Association); C.I. No. 354 (City of San Antonio); C.I. No. 358 (New Braunfels Utilities). The remaining comments supported nonattainment designations. *E.g.*, C.I. No. 352 (American Lung Association); C.I. No. 357 (Environmental Defense Fund); C.I. No. 370 (Loni Carlson).

C. EPA's modification of Texas's Bexar County designation

1. The Challenged Action

The Challenged Action "designat[ed] Bexar County as the San Antonio, Texas nonattainment area and the [surrounding] seven counties as attainment/unclassifiable areas." 83 Fed. Reg. at 35,136; *see id.* at 35,141. The action classified Bexar County as a marginal nonattainment area, confirming that the level of ozone in Bexar County was not far above the NAAQS. *Id.* at 35,136, 35,139 & Table 1, 35,141. The action stated that EPA based its designation of Bexar County and the surrounding counties on "the most recent 3 years of certified ozone air quality monitoring data (2015–2017) and on an evaluation of factors to assess contributions to nonattainment in nearby areas." *Id.* at 35,137.

In discussing EPA's modification power under section 7407(d)(1)(B)(ii), the Challenged Action stated that "[t]he statute does not define the term 'necessary,' but the EPA interprets this to authorize the Administrator to modify designation recommendations that are inconsistent with the statutory language." *Id.* at 35,138. It further noted that "[i]f a state fails to provide any recommendation for an area, in whole or in part, the EPA must promulgate a designation that the Administrator deems appropriate." *Id.*; *see supra* p. 6.

2. Supporting documents

As required by 42 U.S.C. § 7607(d)(6)(B), EPA issued a response to the subset of the public comments it considered significant. C.I. No. 427. In response to comments asking EPA not to designate Bexar County a nonattainment area, EPA stated that the statute's use of the present tense precluded it from even considering photochemical modeling of future ozone levels showing attainment by 2020. *Id.* at 7 ("There are two violating monitors in Bexar County and, thus, Bexar County meets the definition of 'nonattainment.' . . . [42 U.S.C. § 7407(d)] is written in the present tense; designations are based on the current status of the area."); *accord id.* at 10, 11; *see also id.* at 8-9 (EPA's response to comments urging the agency to designate the seven surrounding counties and sources in "the Eagle Ford Shale" part of the San Antonio nonattainment area).

In its final technical support document, EPA reiterated the view that it "must designate an area nonattainment if [the area] has an air quality monitor that is violating the standard." C.I. No. 428 at 1; *accord id.* at 6, 8, 9, 20. That view was consistent with a guidance document the agency issued in 2016 to assist States in making initial

designations for the 2015 ozone NAAQS. EPA Memorandum re. Area Designations for the 2015 Ozone National Ambient Air Quality Standards at 2 (Feb. 25, 2016), https://www.epa.gov/sites/production/files/2016-02/documents/ozone-designations-guidance-2015.pdf (available at https://www.epa.gov/ozone-designations/epa-guidance-area-designations-2015-ozone-naaqs) (recommending that States base their designations on "the 3 most recent years of quality assured monitoring data"); *accord id.* at 3, 13; *cf. id.* at 5-6, Attachment 3 at 1-11 (discussing five factors (air-quality data, emissions and emissions-related data, meteorology, geography/topography, and jurisdictional boundaries) that EPA recommended States consider when determining the boundaries of nonattainment areas). The technical support document also explained the basis for EPA's attainment/unclassifiable designation of the other counties in the San Antonio metroplex. C.I. No. 428 at 7-22.

IV. Procedural History of Petitions for Review

Petitions for review of the Challenged Action were timely filed in two circuits by adverse petitioners/cross-respondents-intervenors that disagreed about the proper venue for this litigation. *See* Texas Petitioners' Opposed Motion to Confirm Venue at 6-8, *Texas v. EPA*, No. 18-60606 (5th Cir. Oct. 17, 2018) ("Venue Motion"). The Texas Petitioners sought review in this Court of the Challenged Action's Bexar County nonattainment designation, the Sierra Club sought review in the D.C. Circuit of the Challenged Action's attainment/unclassifiable designation of the surrounding counties, and each of those petitioners filed protective petitions for review in the circuit the other claimed was the proper venue. *See id.*, Apps. 2-5.

In this Court, each petitioner (along with the Environmental Defense Fund, aligned with the Sierra Club) successfully moved to intervene in support of EPA with respect to the other's challenge. *See id.*, Apps. 8, 11; Order at 2, *Texas v. EPA*, No. 18-60606 (5th Cir. Oct. 26, 2018) ("Oct. 26 Order") (granting the Texas Petitioners leave to intervene). And in light of the Sierra Club's petition for reconsideration asking EPA to alter the venue portion of the Challenged Action (which reflects EPA's view that venue lies in this Court, rather than the D.C. Circuit, 83 Fed. Reg. at 35,140), the Texas Petitioners filed an opposed motion to confirm that venue lies in this Court and an unopposed motion to extend all deadlines in the consolidated D.C. Circuit cases involving the Sierra Club's petition for review and the Texas Petitioners' protective petition for review. Venue Motion; Texas Petitioners' Motion to Extend All Deadlines, *Sierra Club v. EPA*, No. 18-1262 (lead) (D.C. Cir. Oct. 17, 2018). In response to the latter motion, the D.C. Circuit held the consolidated cases in abeyance pending this Court's venue determination. Order, *Sierra Club v. EPA*, No. 18-1262 (lead) (D.C. Cir. Oct. 23, 2018).

Shortly thereafter, this Court granted the Texas Petitioners' motion to confirm that venue lies in this Court and denied an opposed motion that the Sierra Club and the Environmental Defense Fund had filed asking this Court to hold the case in abeyance pending a potential ruling by EPA on the Sierra Club's reconsideration petition. Oct. 26 Order at 1-2. In contrast to a venue determination in a case last year involving area designations for a different NAAQS, the order in this case did not suggest that reconsideration of the venue question by the merits panel would be appropriate. *See Texas v. EPA*, 706 F. App'x 159, 161 (5th Cir. 2017) (per curiam) (unpublished). It

instead "ORDERED that the petitioners' opposed motion to confirm the venue for petitions for review of the challenged action lies in the United States Court of Appeals, 5th Circuit, allowing merits briefing in this case to proceed is GRANTED." Oct. 26 Order at 1-2.

No party sought reconsideration of that order, which went on to adopt the briefing format that the parties agreed should govern if the Court ruled as it did on the preliminary motions. *Id.* at 2 (adopting Texas Petitioners' Unopposed Motion for Leave to Intervene in Support of Respondents and to Establish Briefing Format at 13, *Texas v. EPA*, No. 18-60606 (5th Cir. Oct. 22, 2018)). Instead, in response to a subsequent D.C. Circuit motion that the Texas Petitioners filed asking that Court to transfer the consolidated D.C. Circuit cases to this Court, the Sierra Club encouraged the D.C. Circuit to make its own venue determination, notwithstanding this Court's order. *See* Texas Petitioners' Motion to Transfer, *Sierra Club v. EPA*, No. 18-1262 (lead) (D.C. Cir. Nov. 5, 2018); Sierra Club's Opposition to Texas's Motion to Transfer, *Sierra Club v. EPA*, No. 18-1262 (lead) (D.C. Cir. Nov. 7, 2018); Texas Petitioners' Reply in Support of Motion to Transfer, *Sierra Club v. EPA*, No. 18-1262 (lead) (D.C. Cir. Nov. 9, 2018). At the time this brief was filed, the D.C. Circuit had not yet ruled on the Texas Petitioners' motion to transfer the consolidated D.C. Circuit cases to this Court.

SUMMARY OF THE ARGUMENT

I. EPA impermissibly overrode Texas's Bexar County attainment designation and imposed its own nonattainment designation. Under section 7407(d)(1)(B)(ii), EPA may modify a State's designation only when "necessary"—that is, only when

EPA has no choice but to make the modification. That limited authority stands in contrast to EPA's ability to make whatever designations it considers "appropriate" when a State fails to make initial designations. The distinction drawn by Congress's use of "necessary" and "appropriate" in section 7407 is just one example of the Clean Air Act's structure of cooperative federalism, reflecting the limited role the agency may play when a State exercises one of its powers under the Act.

EPA's modification of Texas's Bexar County attainment designation was based on the agency's conclusion that the present-tense language of section 7407(d)(1)(A)(ii) precluded reliance on modeling data predicting future conditions. But the statute reflects that, when the future time relevant to a State's modeling projection is nearer than the time in which the State would be required to achieve attainment if the area were designated nonattainment, a State may rely on that modeling when designating an area "attainment." Although section 7407(d)(1)(A)(ii) is phrased in the present tense, the Dictionary Act makes the present tense include the future tense in this circumstance. Contrary to the Environmental Defense Fund's assertion below, nothing in the relevant statutory context makes the Dictionary Act's default tense rule inapplicable here. And because the portion of EPA's action that the Texas Petitioners challenge is based on a conclusion that the statutory text forced the agency to modify Texas's designation, EPA is not entitled to *Chevron* deference on this point. The Court should set aside the Bexar County portion of the Challenged Action based on EPA's refusal to consider the modeling data on which Texas relied and that EPA's acting

administrator acknowledged shortly before the action's publication in the Federal Register.

II. That disposition would be the correct one here even if the Court rejected Texas's argument based on the distinction between "necessary" and "appropriate" in section 7407(d)(1)(B)(ii) and concluded that EPA has broader leeway to modify a State's designation. Under that view of the statute, EPA would still be able to consider the modeling data regarding Bexar County. Because EPA refused to consider that data, it acted contrary to law, so this Court should set aside the Bexar County portion of the Challenged Action.

STANDARD OF REVIEW

The Court may set aside an EPA action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); 42 U.S.C. § 7607(d)(9)(A); *Texas v. EPA*, 690 F.3d 670, 676 (5th Cir. 2012).

ARGUMENT

I. Contrary to EPA's Determination, Modification of Texas's Bexar County Attainment Designation Was Not Necessary.

Consistent with the Clean Air Act's structure of cooperative federalism, section 7407(d)(1) limits EPA's ability to modify a State's area designations. The agency may take that action only when "necessary." 42 U.S.C. § 7407(d)(1)(B)(ii). As explained below, modification was not necessary here, and EPA's contrary conclusion was based on an erroneous reading of the statute.

A. Modification of a State's designation is "necessary" under section 7407(d)(1)(B)(ii) only if EPA has no choice but to make it.

1. When Congress "'uses certain language in one part of [a] statute and different language in another, the court assumes different meanings were intended.'" *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46:06, p. 194 (6th rev. ed. 2000)); *accord In re Positive Health Mgmt.*, 769 F.3d 899, 907 (5th Cir. 2014); *see Miss. Poultry Ass'n v. Madigan*, 992 F.2d 1359, 1364 (5th Cir. 1993) (favorably citing a party's assertion that "[t]he use of different words or terms within a statute indicates that Congress intended to establish a different meaning for those words" (quotation marks omitted)). That principle applies to the words "necessary" and "appropriate" as used in the Clean Air Act. *See Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015) (stating that "if uncertainty about the need for regulation were the *only* reason to treat power plants differently, Congress would have required the Agency to decide only whether regulation remains 'necessary,' not whether regulation is 'appropriate *and* necessary.'" (quoting 42 U.S.C. § 7412(n)(1)(A) with emphasis added)).

"Necessary" means something that must be done. *Union Elec. Co. v. EPA*, 427 U.S. 246, 263 (1976) (explaining that "the most natural reading of the 'as may be necessary' phrase in context is simply that [EPA] must assure that the minimal, or 'necessary,' requirements are met, not that [it] detect and reject any state plan more demanding than federal law requires" (quoting Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1680 (1970), § 110(a)(2)(B)); Merriam Webster's Collegiate Dictionary 776 (10th ed. 1993) (defining "necessary" as "of an inevitable nature: inescapable," "compulsory," "absolutely needed: required" (formatting altered)); 10 Oxford

English Dictionary 275-76 (2d ed. 1989) (defining "necessary" as "[i]ndispensable, requisite, essential, needful; that cannot be done without"); Random House Dictionary of the English Language 1283-84 (2d unabridged ed. 1987) (defining "necessary" as "being essential, indispensable, or requisite"); *compare* Black's Law Dictionary 1029 (6th ed. 1990) (citing a 1939 opinion from the Oklahoma Supreme Court for the proposition that "[n]ecessary" can have different meanings (ranging from "absolute physical necessity" to "appropriate") in different contexts), *with* Black's Law Dictionary 1192 (10th ed. 2014) (defining "necessary" as "[t]hat is needed for some purpose or reason; essential" and "[t]hat must exist or happen and cannot be avoided; inevitable"), *and* Bryan A. Garner, A Dictionary of Modern Legal Usage 371 (1987) ("[n]ecessary . . . means 'essential." (See indispensable.)" (formatting altered)).

"'[A]ppropriate,'" by contrast, is "'the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors.'" *Michigan*, 135 S. Ct. at 2707 (quoting *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1266 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part)); Merriam Webster's Collegiate Dictionary 57 (10th ed. 1993) (defining "appropriate" as "especially suitable or compatible: fitting" (formatting altered)); 1 Oxford English Dictionary 586 (2d ed. 1989) (defining the relevant sense of "appropriate" as "[s]pecially fitted or suitable, proper"); Random House Dictionary of the English Language 103 (2d unabridged ed. 1987) (defining "appropriate" as "suitable or fitting for a particular purpose, person, occasion, etc.").

Those authorities inform the meaning of "necessary" and "appropriate" in section 7407(d)(1)(B)(ii). Under that provision, EPA's power is limited to making "necessary" modifications to a list of designations submitted by a State; only when a State declines to submit a list may EPA make the designations it considers "appropriate." 42 U.S.C. § 7407(d)(1)(B)(ii). And any suggestion that "necessary" could have a looser meaning in this context would fail in light of Congress's juxtaposition of that word with "appropriate" in section 7407(d)(1)(B)(ii). *Cf. Catawba County v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009) (per curiam) (identifying "necessary" in section 7407(d)(1)(B)(ii) as ambiguous in the context of determining nonattainment-area boundaries but not considering the contrast between "necessary" and "appropriate" at all, much less with respect to the determination of whether an area should be designated nonattainment, attainment, or unclassifiable).

Finally, although judicial opinions, EPA documents, and even briefing submitted by States in other Clean Air Act cases sometimes describe the States' role under section 7407(d)(1)(A) as making mere "recommendations" for area designations, *e.g.*, *Pa., Dep't of Envtl. Prot. v. EPA*, 429 F.3d 1125, 1126 (D.C. Cir. 2005), that description is contrary to statutory text, and this Court should expressly reject it. Under the plain language of section 7407(d)(1)(A), States make "designat[ions]," not recommendations. Under section 7407(d)(1)(B)(i), EPA must then perform the ministerial task of "promulgat[ing]" the States' designations. *See* 42 U.S.C. § 7407(d)(2)(A). EPA may modify a State's designations under section 7407(d)(1)(B)(ii) only upon a showing that modification is "necessary," as opposed

to what EPA would consider "appropriate" had the State declined to make designations.

2. That framework is part of the Clean Air Act's overarching structure of cooperative federalism. *See, e.g.*, *Texas*, 829 F.3d at 411; *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921, 929, 932 (5th Cir. 2012); *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001). In *Florida Power & Light Co. v. Costle*, this Court explained that

> [t]he great flexibility accorded the states under the Clean Air Act is . . . illustrated by the sharply contrasting, narrow role to be played by EPA. . . . "[T]he Act provides that [EPA] 'shall approve' [a State's] proposed [implementation] plan if it has been adopted after public notice and hearing and if it meets (the) specified criteria. . . ."

650 F.2d 579, 587 (5th Cir. Unit B June 1981) (quoting *Union Elec.*, 427 U.S. at 250 (quoting Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1680 (1970), § 110(a)(2))); *see Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).

In light of "the strictly circumscribed role of the EPA" under what is now 42 U.S.C. § 7410, the Court concluded in *Florida Power & Light* that EPA "abused its discretion in attempting to require [a State] to include" a limitation in a proposed revision to the State's plan to implement a NAAQS. 650 F.2d at 587. It explained that "EPA c[ould] point to no provision of section 110(a)(2) of the Act [current 42 U.S.C. § 7410(a)(2)] that requires it to incorporate the . . . limitation and, as *Train* and *Union Electric* make clear, that is EPA's only proper inquiry." *Id.* at 588; *see Union Elec.*, 427 U.S. at 250; *Train*, 421 U.S. at 79; *see also Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 518 (2004) (Kennedy, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting) (stating that "[i]f cooperative federalism . . .

is to achieve Congress' goal of allowing state governments to be accountable to the democratic process in implementing environmental policies, federal agencies cannot consign States to the ministerial tasks of information gathering and making initial recommendations, while reserving to themselves the authority to make final judgments under the guise of surveillance and oversight").

Similarly, EPA has license under section 7407(d)(1)(B)(ii) to modify a State's designation only when doing so is "necessary"—not when EPA would merely have found it "appropriate" to make a different designation, if the statute gave the agency that power in the scenario presented here. The proper question in this case, then, is whether EPA correctly determined that the Clean Air Act compelled it to modify Texas's attainment designation and forbade it to consider the photochemical modeling data on which Texas relied. As explained below, the statutory text does not support EPA's conclusion on that point.

B. EPA erred in concluding that section 7407(d)(1)(A)(ii) necessitates exclusive reliance on data from air-quality monitors.

Citing the present-tense language of section 7407(d)(1)(A)(ii), EPA rejected Texas's reliance on modeling reflecting that Bexar County would attain the 2015 ozone NAAQS without federal intervention by the time it would have to do so if it were designated a nonattainment area in 2018. *See supra* pp. 9-13. EPA's analysis is inconsistent with the Dictionary Act, which applies here to make the relevant present-tense language include the future tense. The agency's refusal to consider the modeling data on which Texas relied was therefore improper.

1. The Dictionary Act expands the present-tense language of section 7407(d)(1)(A)(ii) to include the future tense in this scenario.

The Dictionary Act provides: "In determining the meaning of any Act of Congress, unless the context indicates otherwise— . . . words used in the present tense include the future as well as the present." 1 U.S.C. § 1. Section 7407(d)(1)(A) is phrased in the present tense. In particular, section 7407(d)(1)(A)(ii) allows a State to "designat[e] as . . . attainment, any area (other than an area identified in clause (i)) that meets the [NAAQS]."

If the Dictionary Act's default rule regarding the future tense applies here, the phrase "that meets" in section 7407(d)(1)(A)(ii) means "that meets or will meet." The question is whether the statutory context indicates otherwise. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) (explaining that the Supreme Court "must consult" the Dictionary Act "'[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise'" (quoting 1 U.S.C. § 1)).

Context is undoubtedly important here. It would not make sense to apply the Dictionary Act's default tense rule to open, but never close, the period for showing satisfaction of a NAAQS. At the same time, failure to apply the default rule in these circumstances would be inconsistent with surrounding statutory text, as discussed below.

In this case, the Court need not decide the outer limits that statutory context places on the Dictionary Act's application to section 7407(d)(1)(A). The narrower question presented is whether a State may appropriately base a section-7407(d)(1)(A)(ii) attainment designation on modeling data showing that the area in question will attain the NAAQS by the time it would have to do so if EPA designated

the area nonattainment. Both case law applying the Dictionary Act in an analogous setting and the statutory context of section 7407(d)(1)(A)(ii) point to an affirmative answer to that question.

a. To the petitioners' knowledge, no court has considered whether the Dictionary Act's default tense rule applies to section 7407(d)(1)(A). But a decision applying this portion of the Act in a different context is instructive.

In *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, the Second Circuit considered a portion of the Indian Gaming Regulatory Act that "defines 'Indian lands,' in relevant part, as 'lands within the limits of any Indian Reservation' or 'lands title to which *is* . . . held in trust by the United States for the benefit of any Indian tribe.'" 547 F.3d 115, 125 (2d Cir. 2008) (per Sotomayor, J.) (quoting 25 U.S.C. § 2703(4) with emphasis added). The court applied the Dictionary Act's default rule to reject an argument that the present tense "is" renders the statute inapplicable to land that is not yet, but will be, held in trust by the United States. *Id.* at 126. The court explained that "the Dictionary Act instructs us to read the words 'which *is* held in trust' to also include land that *will be* held in trust"—and that failure to do so "would thwart Congress's intent to have the [National Indian Gaming Commission] oversee contracts for the purpose of promoting the best interests of Indian tribes." *Id.* (quoting 25 U.S.C. § 2703(4) with emphasis added); *accord Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 784-87 (9th Cir. 2008) (N.R. Smith, J., dissenting). *Contra Guidiville Band*, 531 F.3d at 776-79 (majority opinion). In reaching that conclusion, the Second Circuit declined to follow an opin-

ion memo authored by the Commission's deputy general counsel that, like the portion of the EPA action challenged here, was "based on nothing more than a literal reliance on the statutory language's use of the present tense." *Catskill Dev.*, 547 F.3d at 127.

b. As the Supreme Court has explained, the word

> "[c]ontext" [in the Dictionary Act] means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts . . . . If Congress had meant to point further afield, as to legislative history, for example, it would have been natural to use a more spacious phrase, like "evidence of congressional intent," in place of "context."

Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194, 199 (1993). The Court went on to note that, "[i]f 'context' thus has a narrow compass, the 'indication' contemplated by 1 U.S.C. § 1 has a broader one." *Id.* at 200. But as another court has correctly observed, "the Act's exception for instances when 'the context indicates otherwise' applies only when its use would produce genuine discord and is necessary to 'excus[e] the court from forcing a square peg into a round hole.'" *United States v. Jackson*, 480 F.3d 1014, 1019 (9th Cir. 2007) (quoting *Rowland*, 506 U.S. at 200). That is not the case here, regardless of whether the Court looks to the broader context of nonattainment designations and their consequences or the narrower context of section 7407.

i. A nonattainment designation triggers a host of air-quality planning and control measures aimed at forcing the designated area into attainment status within a specified time. *See* 42 U.S.C. §§ 7501-7511f; *Nat. Res. Def. Council v. EPA*, 777 F.3d 456, 464 (D.C. Cir. 2014). The measures include requiring new major emissions sources to comply with the lowest achievable emission rate, requiring the owners or

operators of every major stationary source of ozone precursors to file statements reflecting the volume of actual emissions of those compounds, and requiring major emissions sources to offset increased emissions resulting from new construction or major modifications. 42 U.S.C. §§ 7503(a)(2), 7511a(a)(3)(B), 7511a(a)(4).

Satisfying those requirements and the numerous others that come with a nonattainment designation is burdensome and expensive. As already noted, one commenter estimated that if EPA's "marginal" Bexar County nonattainment designation were allowed to stand, the cost would exceed a billion dollars. C.I. No. 214 at 2 (citing C.I. No. 297, App. B at v).

Unless the Bexar County portion of the Challenged Action is set aside, EPA's nonattainment designation means that air quality in Bexar County would have to register "attainment" within three years of EPA's 2018 designation. *See* 42 U.S.C. § 7511(a) (Table 1), 7511(b)(1); 83 Fed. Reg. at 10,377; *id.* at 10,382 (amending 40 C.F.R. § 51.1303(a) & Table 1). That three-year timeframe is significant here because the modeling on which Texas relied projected that Bexar County would attain the 2015 ozone NAAQS by 2020 on its own—that is, without implementation of the requirements mandated by EPA's nonattainment designation. C.I. No. 297 at 1; *see id.* at 4 (citing pages 1-4 and 4-8 of the report attached as Appendix A).

This statutory context does not "indicate[]" that the Dictionary Act's future-tense provision is inapplicable here. 1 U.S.C. § 1. It instead reflects that reading "that meets" in section 7407(d)(1)(A)(ii) to include "that will meet" within the relevant three-year period is consistent with the structure and purpose of the Clean Air Act's provisions aimed at ensuring timely attainment of NAAQS. *See Union Elec.*, 427 U.S.

at 268, 269 (identifying "prompt attainment of [NAAQS]" as the Clean Air Act's "primary goal" and observing that "Congress plainly left with the States, so long as the [NAAQS] were met, the power to determine which sources would be burdened by regulation and to what extent").

ii. The result would not change if the Court focused on statutory language in closer proximity to the provision at issue. That conclusion is evident from other portions of section 7407, including the portion of section 7407 that the Environmental Defense Fund cited in one of its public comments responding to Texas's reliance on modeling.

Section 7407(d)(4)(B)(ii) reflects that, in contrast to the approach it took in section 7407(d)(1)(A), Congress knows how to require reference only to monitored data from particular times. That provision states that "any area containing a site for which *air quality monitoring data* show a violation of the [NAAQS] for [particulate matter] *before January 1, 1989* (as determined under part 50, appendix K of title 40 of the Code of Federal Regulations) is hereby designated nonattainment for [particulate matter]." 42 U.S.C. § 7407(d)(4)(B)(ii) (emphases added); *see also id.* § 7407(d)(6)(A) (calling upon States to submit area designations "for the July 1997 [fine-particulate-matter NAAQS] . . . *based on air quality monitoring data* collected in accordance with any applicable Federal reference methods for the relevant areas" (emphasis added)).

Another portion of section 7407 reflects that, absent such restrictions, a wide range of discretionary considerations may inform area designations. Section 4707(d)(3)(A) provides that, when analyzing whether an area designation "should

be revised," EPA may look to "air quality data, planning and control considerations, or any other air quality-related considerations [it] deems appropriate." And under the Act's system of cooperative federalism, the States and EPA have the same degree of latitude when making area designations. *See supra* Part I.A.

In one of its public comments, the Environmental Defense Fund cited section 4707(d)(3) as contextual evidence that Texas's reliance on modeling was inappropriate, telling EPA that "the Clean Air Act makes plain that the consideration of future attainment is not a permissible consideration in making initial area designations as the Act sets forth a separate, detailed process by which states can request that the Administrator reclassify an area based on improved air quality." C.I. No. 357 at 6. But just because reclassification is possible does not mean that future modeling cannot be relevant to an initial designation. And as already noted, section 4707(d)(3)(A) reflects the breadth of data that can be relevant to area designations. The Environmental Defense Fund overlooked that provision and, in paraphrasing section 7407(d)(3)(E), highlighted some of the burdens that come with a nonattainment designation. *See id.* at 6 n.25. Texas's point is that the Dictionary Act's default tense provision, as it applies to section 7407(d)(1)(A)(ii) in this scenario, allows the State to avoid those burdens based on modeling showing that an area will be in attainment status by the time a nonattainment designation would require it to be. Far from being at odds with statutory context, that conclusion is consistent with the principle of cooperative federalism that permeates the statute. *See Michigan*, 268 F.3d at 1083 (explaining that EPA's "role is in setting standards, not in implementation").

2. EPA improperly refused even to consider the modeling data that Texas identified, and it may not claim *Chevron* deference here.

One week before the challenged action was published in the Federal Register, Acting EPA Administrator Andrew Wheeler announced that "[i]nformation provided by [Texas] indicates that the San Antonio area is on the path toward attainment, and we expect Bexar County will be able to demonstrate that it meets the standard well in advance of the attainment date in 2021." EPA Finalizes Last 2015 Ozone Designations for 8 Counties in Texas, https://www.epa.gov/newsreleases/epa-finalizes-last-2015-ozone-designations-8-counties-texas (July 18, 2018). Yet EPA concluded, in determining whether modification of Texas's Bexar County attainment designation was necessary, that the present-tense language of section 7407(d)(1)(A) precluded reference to the modeling data on which Texas relied. *See* 83 Fed. Reg. at 35,137, 35,138; C.I. No. 427 at 7, 10, 11; C.I. No. 428 at 1, 6, 8, 9, 20.

For the reasons already stated, that conclusion was erroneous. And any assertion that the Court should defer to EPA's challenged determination under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), would be misplaced here. As the D.C. Circuit has explained, *Chevron* deference is appropriate only "when the agency has exercised its *own* judgment, not when it believes that interpretation is compelled by Congress." *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002) (quotation marks omitted)). Once again, the challenged action reflects EPA's belief that the present-tense language of section 7407(d)(1)(A) compelled it to exclude the relevant modeling data from the scope of its review of Texas's Bexar County attainment designation. "In *Chevron* terms, . . . the agency itself has stopped at step one," and it is therefore not entitled to deference on this point. *Id.*

The Court should set aside the Bexar County portion of the Challenged Action and allow EPA to conduct a new review of Texas's designation that accounts for the modeling data that Acting Administrator Wheeler acknowledged.

II. Even If EPA Could Show That "Necessary" Means "Appropriate," It Erroneously Refused To Consider Relevant Modeling Data.

The Challenged Action cited (at 35,138 n.2) the D.C. Circuit's decision in *Catawba County*, and EPA might rely on that decision to counter the Texas Petitioners' argument that "necessary" has a more restrictive meaning than "appropriate." *See supra* Part I.A. But even if the Court equates "necessary" and "appropriate" in section 7407(d)(1)(B)(ii) and concludes that EPA has broad discretion to modify a State's area designations, it should still set aside the Bexar County portion of the Challenged Action.

As explained in Part I.B, section 7407(d)(1)(A)(ii) does not preclude reliance on modeling data reflecting projected future air quality in circumstances such as these. For that reason, EPA at least had discretion to promulgate Texas's Bexar County attainment designation without modification, absent a conclusion that the cited modeling did not support that result. *See Catawba County*, 571 F.3d at 36-38. It could therefore not have been proper for EPA to refuse even to consider the modeling data.

Yet that is what EPA did. Its technical support document stated several times that the agency must designate an area nonattainment if the area contains an air-quality monitor that is violating the NAAQS, and it merely described the modeling data on which Texas relied without addressing the 2020 projection central to Texas's designation. C.I. No. 428 at 1, 2, 6, 8, 9, 20; *see* C.I. No. 297 at 2-5; C.I.

No. 297 at 1, 7. EPA's response to comments repeated the agency's understanding that the present-tense language of section 7407(d)(1)(A)(ii) prevented it from considering the modeling data and, like the technical support document, failed to address the 2020 modeling on which Texas relied. C.I. No. 427 at 7, 10, 11.

EPA should be required to consider that modeling data. If it concludes that the modeling supports Texas's Bexar County attainment designation, it should decline to modify that designation. And if it concludes that the modeling does not support Texas's designation, it should explain why that is so.

CONCLUSION

The Court should set aside the portion of the Challenged Action that designates Bexar County a nonattainment area. The Court should not disturb the portions of the Challenged Action that designate Atascosa, Bandera, Comal, Guadalupe, Kendall, Medina, and Wilson Counties attainment/unclassifiable areas.

Respectfully submitted.

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Certificate of Service

On November 26, 2018, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and the parties' agreed briefing format because it contains 8,002 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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